No. 3846

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CROWLEY LAUNCH AND TUGBOAT COMPANY (a corporation),

Appellant,

vs.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION (a corporation), and the American Ship "MONONGAHELA", her engines, tackle, apparel, etc.,

Appellees,

UNITED STATES OF AMERICA,

Claimant.

BRIEF FOR APPELLANT (LIBELANT).

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Of Counsel.

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General Statement of the Case.

This is an action brought by the Crowley Launch and Tugboat Company for the destruction of its lighter No. 76 while in the possession of the charterers, the United States Shipping Board Emergency Fleet Corporation. The destruction of this lighter took place on Monday, December 15, 1919, while the lighter was lying alongside the American bark "Monongahela", then at Pier 36, San Francisco.

The American bark "Monongahela" was on that date owned by the United States and operated through the Emergency Fleet Corporation by Struthers & Dixon, Inc., of San Francisco, as operating agents. On Tuesday, December 9, 1919, Struthers & Dixon, Inc., orally chartered from the Crowley Company lighter No. 76, to be used to receive not over 400 *short* tons of ballast from the "Monongahela". On Wednesday, December 10th, the Crowley Company towed the lighter No. 76 alongside the "Monongahela" and left her with her lines fast to the bark.

The "Monongahela" had shortly before that time arrived from the Orient and, since strike conditions then prevailed at San Francisco, was discharging with a strike-breaking crew of stevedores. On Friday, December 12, 1919, the stevedores, in charge of a gang boss named W. C. Messick, began to discharge the ballast from the "Monongahela" on to the lighter. The ballast was a wet clay-like sand or gravel, and was dumped by cubic yard buckets filled in the lower hold and raised and swung over the lighter through power furnished by a donkey boiler on the pier at which the "Monongahela" lay.

This ballast was dumped on to the lighter Friday, Saturday, Sunday and Monday. On Monday afternoon, while this discharging was still going on, David Crowley, of the Crowley Company, happened to be going along the waterfront and noticed that something appeared to be wrong with the barge. He sent immediately for Wilder, the barge super-

intendent of the Crowley Company. Wilder shortly came down and found the lighter in a critical condition. He states that her condition was due to overloading and to the fact that the lighter was strained through improper loading and failure to trim. He told the stevedores to stop discharging and to trim the load on the barge.

Messick, the head stevedore, ordered the discharging stopped. He called the men up from the hold of the "Monongahela" and, for the first time, gave orders to trim the load. It was too late. The ballast had already begun to slide outboard, and the barge began to get lower on the outboard side. As the ballast slid from the piles the strain on the outboard side became increasingly greater. The steel cable and heavy lines from the "Monongahela" bound the barge to the ship and prevented the barge from dumping her load. Finally the strain on the outboard side of the barge became terrific; the lines were too powerful to break, and the barge collapsed with a roar like an explosion and became a total loss.

A libel was filed a few days afterwards against the bark "Monongahela" and the Emergency Fleet Corporation. This libel set out the delivery of the barge in good order and condition and her redelivery totally destroyed. The answer denied that the barge was overloaded, and set out that the loss was caused by the unseaworthiness of the barge.

Prior to trial the deposition of W. C. Messick, an employee of the stevedoring company, and who had

charge of the loading, was taken by the libelant. He admitted that he had overloaded the barge, had failed to trim her at any time prior to the last effort to save her, and that he had improperly loaded her. He testified that on the morning of the day the barge was destroyed he thought he had loaded all that he could get on the barge and asked the stevedoring company for another barge, but that this request was refused.

The depositions of the captain and a deckhand of a tugboat which was near the scene of the disaster were also taken. They testified that the lighter was improperly loaded and overloaded. Another stevedore located by the libelant corroborated the testimony of Mr. Messick.

The witnesses introduced by the respondents did not deny that the barge *had not been trimmed at any time during the entire loading,* and that it was not until the barge was in a sinking condition that the loading was stopped and the men ordered up from the hold for the now hazardous task of attempting to trim her. The respondents' witnesses did not deny that the lighter was buckled by the loading. They did not deny that one of the efficient causes of the collapse of the barge was the failure to loosen or cut the taut heavy lines between the barge and the ship after the load had begun to slide. They did not give a word of testimony to the effect that the barge was unseaworthy. They did not deny that a new barge was called for by the foreman of the stevedoring company on the morning of Monday,

the day of the accident, and that the superintendent of the stevedoring company refused the request.

The defense of the respondents was principally based upon their claim that less than 400 tons was loaded on the barge. This claim was made through the medium of an expert witness who based his theory as to the number of tons on the barge upon the amount of ballast alleged to have been delivered to the ship at Manila.

The Lower Court's Decision.

The lower Court gave the following opinion:

> "It is not established that more sand was loaded on the barge 76 than she was chartered to carry, and the method of loading was not improper. It is just as likely that the barge, being old, made more water than usual, and that this was the cause of her loss.
>
> "The libel will therefore be dismissed."
>
> (Record, 292.)

Specification of Errors Relied Upon.

I.

The opinion and order dismissing libel and the final decree dismissing libel and ordering and adjudging that the libelant take nothing are not warranted by the evidence, and are erroneous.

II.

The District Court erred in the following respect: that whereas the only findings of the District Court were as follows:

> "It is not established that more sand was loaded on the barge 76 than she was chartered to carry, and the method of loading was not improper. It is just as likely that the barge, being old, made more water than usual, and that this was the cause of her loss;"

and whereas the Crowley Launch and Tugboat Company chartered the barge to the respondents; the District Court in ordering the libel dismissed failed to apply the rule of law that to avoid liability for damage to a lighter in possession of the charterer the charterer must show: (1) how the damage occurred; (2) that it was not caused through its negligence, or through the negligence of anyone to whom the respondents had entrusted the barge.

III.

The District Court erred in the following respect: that in making the above findings and entering the following order, "The libel will therefore be dismissed", the District Court failed to apply the rule that the charterer (respondent) has the burden of proof to show freedom from negligence.

IV.

The District Court erred in the following respect: that whereas the Court found the proof equally divided, and found that the respondents' conten-

tions were "just as likely" as the libelant's, the Court failed to apply the rule that the respondents as charterers had the burden of proof as to how the damage occurred, and that it was not caused through the charterers' negligence, and failed to enter a final decree in said cause in favor of the libelant.

V.

The District Court erred in holding that, since it was not established by the libelant that more sand was loaded on the barge than she was chartered to carry, and since it was just as likely that the barge made more water than usual and as likely that this caused the loss, the libel should be dismissed.

VI.

The District Court erred in finding that it is not established that more sand was loaded on the barge 76 than she was chartered to carry.

VII.

The District Court erred in finding that it is just as likely that the barge, being old, made more water than usual, and as likely that this was the cause of her loss.

VIII.

The District Court erred in overruling the objection by the libelant to the introduction into evidence of an alleged bill purporting to have been made at Manila, Philippine Islands, and reading as follows:

"Manila, P. I., July 10, 1919.

"Struthers & Dixon,
Manila, P. I., agents Sailer 'Monongahela',
To Atlantic, Gulf & Pacific Company of Manila, Dr.
800 metric tons sand ballast supplied and put on board the ship 'Monongahela' at P.3.50 per ton, 2800";

(Respondents' Exhibit A):

which purported bill was introduced over the objection that it was incompetent, immaterial, irrelevant and hearsay.

IX.

The District Court erred in admitting into evidence a purported invoice rendered to the "Monongahela" in Manila, to prove that the number of tons of ballast stated in the invoice to have been delivered was in fact delivered to the vessel; the correctness and the rendering of which invoice was testified to only by a port superintendent of Struthers & Dixon, Inc., in San Francisco, whose testimony was based on the fact that he found the alleged invoice in the files of his company in San Francisco.

X.

The District Court erred in entering a final decree dismissing the libel herein.

XI.

The District Court erred in refusing to enter a decree in favor of the libelant for the damages sustained by it by reason of the loss and destruction of its barge as set forth in the pleadings herein, with

interest and costs, and in not adjudging the respondents at fault for said loss and destruction.

I.

THE OPINION OF THE LOWER COURT AND THE LAW APPLICABLE TO THE CASE.

To understand the opinion of the lower Court, it is necessary to bear in mind that the respondents (charterers) concentrated their defense in the claim: the barge was chartered to carry 400 tons and only 400 tons were loaded on her. The libelant introduced testimony showing that considerably over 400 tons were loaded on the barge; the respondents that not more than 400 tons were loaded. The amount on the barge while important was, of course, merely one of the points at issue. It was emphasized by the respondents, however, as if it were the only point in controversy.

The Court in its opinion says "It is not established that more sand was loaded on the barge 76 than she was chartered to carry." In other words: It is not proved that over 400 tons was loaded on the barge. The Court then says: "The method of loading was not improper"; i. e. (and this is the only finding in the case): The *method* of loading was proper.

The Court then states: "It is just as likely that the barge, being old, made more water than usual, and that this was the cause of her loss." This raises

the question: just as likely as what? Undoubtedly the Court meant: It is just as likely that the loss was caused by unusual leaking of the barge as that the loss was caused by her overloading by the respondents.

The Court made no other findings. The respondents presented a form of decree to the Court in which the Court was to find that the barge was not overloaded and that it was properly loaded and that the loss was caused by the unseaworthiness of the barge. This decree the Court refused to sign and left the grounds of its decision as stated in the opinion.

This brings us to the first question: If an owner charters a barge under a demise or bare ship charter and if the barge is destroyed while in the possession of the charterer, and with admittedly a heavy loss, does the owner fail to recover if he cannot prove the barge overloaded—or is the burden of proof on the charterer to show that the barge was not overloaded and that she was carefully loaded while in its possession?

That a charter of a barge for use by a charterer constitutes a demise, has long been settled (*Hastorf v. F. R. Long etc. Co.,* 239 Fed. 852). So broad is this rule that it has been held that a charter of a barge without motive power will constitute a demise even where the owner keeps a man aboard, called captain by courtesy (*The Willie,* 231 Fed. 865; *Monk v. Cornell Steamboat Co.,* 198 Fed. 472; *The Daniel Burns,* 52 Fed. 159).

The general duty of demise charterers as bailees was summarized in *Smith v. Bouker,* 49 Fed. 954, where the Circuit Court of Appeals for the Second Circuit, in holding a charterer liable for the loss of a barge, said:

> "It is elementary law that the hirer of a chattel impliedly undertakes to use it well, to use it for no other purpose than that for which it is hired, to take proper care of it, and to restore it at the time appointed. In all of these things he is bound to exercise the diligence of a prudent man; and for any default, whether his own personal fault or negligence or that of his subagents or servants, is responsible to the owner."

In *Charles Killam & Co. v. Monad Engineering Co.,* 216 Fed. 438, the Court said:

> "It is usual for a charter party to contain a stipulation for or warranty of the seaworthiness of the vessel on the one side, and, on the other, a stipulation or covenant to deliver up the vessel in the same good order and condition as when originally delivered, ordinary wear and tear and perils of the sea excepted. Each and both of these covenants are, however, implied whether expressed or not, so that, under the facts in this case, the findings of fact of express covenants are unimportant."

But not only is the charterer or bailee of a lighter liable for his own negligence, but he is liable for negligence of a third party, although an independent contractor, whom he has permitted to use the lighter chartered or to perform any of the services for which it was chartered (*White v. Schoonmaker-Connors Co., Inc.,* 265 Fed. 465, 467).

The last word of law upon the effect of such a demise of a lighter is set out by the Circuit Court

of Appeals for the Second Circuit in *Schoonmaker-Connors Co. v. Lambert Transportation Co.,* 268 Fed. 102 (July 3, 1920). Here the Court said:

> "It appears, and indeed is conceded, that when the Katterskill was chartered to the Lambert Transportation Company, respondent herein, she was in good condition, and that when the boat was returned she was in bad condition. It was therefore incumbent upon the aforesaid respondent to show: (1) How the damage occurred; and (2) that it was not caused through its negligence, or through the negligence of any one to whom the respondent had intrusted the boat."

The above principle is in no sense new, and its application was worked out by the Circuit Court of Appeals in two leading cases. In *Swenson v. Snare & Triest Company,* 160 Fed. 459 (C. C. A. 2d, 1908), an action was brought by Johan Swenson, the owner of a pile driver, against its demise charterer for the loss of the pile driver through sinking. The charterer made the usual defense that the pile driver was old in 1901 and lying in the mudflats of New Jersey, and that water stood in her when he purchased her, four years previous to the sinking in question. The owner testified, however, that he had spent considerable money in repairing her and that she had worked satisfactorily after the repairs had been made.

> "The testimony of a majority of the crew is to the effect that the driver turned upside down at the Brooklyn Bridge and shortly afterwards seemed to blow apart from the air and her deckhouse and loose planks floated away and she

> herself sank out of sight after drifting down with the ebb tide for 15 or 20 minutes." (145 Fed. 728, Decision of the District Court.)

A subordinate employee of the respondent stated that at the time the pile driver was chartered he examined her and found her unsound. He further testified that she was so rotten that he could get a handful of wood by merely sticking his hand into her. The Court, however, remarked on the fact that this subordinate's superior, who also examined the pile driver, was not called, and then said of the subordinate's testimony:

> "It appears to be entirely inconsistent with the boat's actual condition at the time of hiring. It is evident that a pile driver in the condition described, could not have done her work for years, as she unquestionably did, and been safely towed around New York Harbor and up the East River as far as Flushing Bay."* (145 Fed. 729.)

There seems to have been no direct evidence as to why the pile driver capsized, although one theory adopted by the Court was that it was turned around suddenly and capsized as a result. The respondent was held liable for the sinking of the pile driver, and appealed.

On appeal the decision of the lower Court was affirmed. The Court said in part:

> "It is admitted that the pile driver was chartered by the respondent from the libelant and that while in the exclusive possession of the

* No attempt was made by respondents to show the lighter No. 76 unseaworthy.

> respondent it sank and was lost. As such an occurrence is not in the ordinary course of things, the burden was thrown on the respondent as a bailee to show how the loss took place and that it was not caused by its negligence."

After referring to the testimony of respondent's witnesses as to the alleged unseaworthiness of the pile driver and as to the decision of the lower Court holding the respondents negligent, the upper Court stated:

> "We need not go so far. It is sufficient for us to say that we have carefully examined the whole record, and in view of the findings of the trial court *are unable to hold that the respondent has sustained the burden of proof imposed on it by law.*" (Italics ours.)

Terry & Tench Co. v. Merritt & Chapman Derrick & Wrecking Co., 168 Fed. 533 (C. C. A. 2d, 1919), involved the following facts:

"In August, 1906, the libelant chartered its derrick to the respondent. About a week later she was found to be leaking and was returned to the libelant for repairs. She was sent to a dry dock and repaired, and was returned to the respondent on September 14th, and was used by it and in its exclusive possession until September 20th, when the accident occurred. On the afternoon of that day she was loaded with stone at Weehawken, N. J., and was made fast alongside the respondent's tug, which started across the Hudson River. When about two-thirds across the river the derrick listed to starboard, capsized and sank. After hearing the evi-

dence the District Judge said, in substance, that she was sunk without known cause, resorted to a presumption that she was unseaworthy, and dismissed the libel."

This decision was reversed on appeal.

After referring to the opinion in *Swenson v. Snare & Triest Co.,* supra, the Circuit Court of Appeals said:

> "These principles are applicable here. The vessel having been injured while in the exclusive possession of the respondent, as bailee, the burden is upon it to show:
>
> (1) How the injury occurred.
>
> (2) That it was free from negligence.
>
> The respondent did show the circumstances of the accident, but offered no evidence to show the cause of the sinking of the vessel, and, to rebut the presumption against it, relied upon the presumption of unseaworthiness arising from the sinking of the vessel without apparent cause."

After stating that the presumption urged had no effect in the case, the Court said:

> "In our opinion the respondent failed to sustain the burden of proof imposed upon it as a bailee in possession, and the decree was erroneous."

Reverting to the opinion of the lower Court in the present case, the lower Court has repudiated the doctrine of the above cases. It has held that when a vessel is lost or damaged while in the possession of a demise charterer, *the owner,* to recover, must show: first, how the loss occurred; and, second, that

it was caused by the negligence of the demise charterer. It further holds that if it is doubtful whether the loss occurred through negligence of the charterer or through the chartered vessel taking more water than usual,* that doubt must be resolved against the owner of the vessel.

It is needless to point out the effect of such a change in the law. It brings about a condition under which, if a company charters a tug or lighter by demise and it is returned destroyed, the owner has no recovery unless he can find out—a most difficult task—what really happened to the vessel while the charterer had possession of it. The door is thrown wide open to the most careless handling of vessels by demise charterers, since in nearly all cases the only chance of recovery by the owner will be through evidence given by the charterers' own employees. To avoid such a travesty on justice the above rule has been established. How serious is the application of such a rule can be clearly seen in the examination of the evidence in the present case.

II.

NO EVIDENCE WAS INTRODUCED TO SHOW THAT THE LIGHTER NO. 76 WHEN DELIVERED TO THE CHARTERER WAS UNSEAWORTHY; ALL THE EVIDENCE AS TO HER CONDITION WAS THAT THE LIGHTER WAS IN A FIRST-CLASS, SEAWORTHY CONDITION.

The respondents in their answer set out as a defense that the lighter was "weak, unseaworthy, im-

*There is no testimony that it usually took water.

properly equipped and wholly unfit and unsuitable for the purposes for which it was chartered". In view of these positive allegations one might have expected that the respondents would have produced some witness to attack the seaworthiness of the lighter. Not a single witness was produced, however, and not one word of testimony was introduced by which the seaworthiness of the barge was attacked. Particularly to be remarked was the testimony of the respondents' witness Edward J. Wieder (Wieder, 171). This witness, the superintendent of the Peterson Launch Company, a rival of libelant's, stated that he had known the lighter "Crowley No. 76" for the past eight years (Id., 171), but did not even suggest that she was unseaworthy.

The libelant, in order to remove any doubt as to the seaworthiness of the barge, introduced considerable testimony. Summarized briefly, the testimony brought out that the Crowley Company, in order to keep its fleet of barges and other craft in good condition, maintains a shipyard in Oakland, employing some fifty men (Crowley, 73-74). Lighters are sent to this shipyard regularly for repairs in order to keep them in first-class condition (Westman, 111). The barge "Crowley No. 76" was at the Crowley shipyard in May, 1919, only seven months prior to her destruction. She was hauled out on the drydock for thirteen days, scraped, cleaned and painted and put in first-class condition (Crowley, 73; Westman, 111). In February, 1919, she had been in the yard and had had her fenders repaired, her top

strakes all around renewed and the stringer around the deck renewed (Westman, 112). Mr. David Crowley, the general manager of the Crowley Company, had carefully examined the barge between thirty and sixty days prior to her destruction (Crowley, 73), going below and checking up her condition. He found her in good condition (Crowley, 73). Before the lighter No. 76 went on the "Monongahela" job Wilder, general superintendent of the Crowley Company, went over the lighter, looking her all over below, and found her in first-class condition (Wilder, 82). He went over her again, going below, on Thursday, four days before the accident (Wilder, 82). On Saturday, two days before the accident, Sennott, the outside superintendent of the Crowley Company, had looked her over, gone below and found her in good condition (Sennott, 97-98).

That the barge was in excellent condition the year before the accident is borne out by the testimony of Mr. Madden, of the Hercules Powder Company, who testified that she carried the following loads of nitrates for his company:

June 7, 1918	465	short tons
July 3, 1918	539	" "
Aug. 10, 1918	532	" "
Oct. 31, 1918	419	" "
Oct. 26, 1918	429	" "

(Madden, 128.)

This nitrate was worth about $90.00 per ton, and if the lighter sank the cargo would dissolve (Mad-

den, 129). Mr. Madden testified that he had been superintendent of transportation for the Hercules Powder Company for seven years, and that his duties included the examination of lighters used by his company (Madden, 127, 129). He examined the condition of the lighter "Crowley No. 76" and stated that he found her in good condition (Madden, 129).

III.

THAT THE LIGHTER NO. 76 WAS OVERLOADED AND BADLY LOADED WAS TESTIFIED TO BY EVERY INDEPENDENT WITNESS WHO SAW IT BEFORE IT SANK, AS WELL AS BY THE MAJORITY OF INTERESTED WITNESSES.

The witnesses who saw the lighter No. 76 shortly before she was lost and who testified that she was then overloaded and improperly loaded were:

Independent:

W. C. Messick, gang foreman of San Francisco Stevedoring Co.*

Edward Jones, stevedore of San Francisco Stevedoring Co.

Louis Langren, captain of tug "Reliance."

E. H. Zecher, deck hand of tug "Reliance."

Interested:

David Crowley, vice president, Crowley Launch and Tugboat Co.

*While Messick and Jones are above termed independent witnesses, as employees of one of the respondents at the time of the disaster, it is natural to believe that they were interested in having the San Francisco Stevedoring Company held blameless. It seems almost incredible that a man like Messick would confess to overloading a barge if it were not true.

J. W. McAndrews, Crowley Launch and Tugboat Co.

J. J. Wilder, former superintendent, Crowley Launch and Tugboat Co.

The witnesses who testified for the respondents as to the condition of the lighter No. 76 before she sank were:

Interested:

James Woodside, superintendent of the San Francisco Stevedoring Co. (third party respondent in case).

W. W. Scott, port superintendent for Struthers & Dixon, Inc. (operators of the "Monongahela").

Marvin Brooks, stevedore of San Francisco Stevedoring Co., who saw barge only when she was sinking.

W. C. Messick was "the foreman or hatch tender on the 'Monongahela' " (Messick, 223), and "as far as the San Francisco Stevedoring Company was concerned had entire supervision of the job" (id. 227). The San Francisco Stevedoring Company was a third party respondent in the action, and admittedly had charge of the loading of the lighter (Record, 27).

Messick's testimony gives a full account of the loading and the destruction of the lighter. Mr. Messick testified that at the time of the taking of his deposition he was an engine foreman for the Southern Pacific Company (Messick, 223). In December, 1919, he was foreman or hatch tender on the

"Monongahela" and employed by the San Francisco Stevedoring Company (id. 223). He was known as "Tom McCue", because the violence prevailing during the strike made it advisable not to use one's correct name (id. 223, 224). The "Monongahela" was moored at the dock, and on about December 10, 1919, the lighter No. 76 was brought alongside (id. 225), and used to receive ballast (id. 225). This ballast was a gravel, sand and clay mixture, very cakey and very wet (id. 225). Messick started loading the barge on Friday and continued Saturday, Sunday and Monday (id. 226). He loaded the ballast upon the barge by means of buckets raised from the hold and dumped on the barge (id. 226). The ballast was dumped into four piles, or cones. The first cone was piled as high as it would go without the ballast running over the side, and the barge was then moved and another cone built up (id. 226).

The number of buckets of ballast totalled:

Friday,	December 12,	A. M.	68	buckets
		P. M.	52	"
Saturday,	December 13,	A. M.	80	"
		P. M.	63	"
Sunday,	December 14,	A. M.	85	"
		P. M.	65	"
Monday,	December 15,	A. M.	75	"
		P. M.	58	"
			546	buckets

(id. 226, 227.)

These buckets ran full all the time. There was no use in bringing the buckets up light, since they are built in such a manner that they must be loaded in order to dump easily (id. 227). Messick was on the "Monongahela" at all times during the discharge.

> "A. Monday I was loading on the last portion of the barge, the stern of the barge, and I got that pretty well filled up at noon time, getting pretty well along, so I spoke to Woodside, Jim, at noon, when he came around and asked me how things were going.
>
> Q. Jim who? A. Woodside. I asked him—I said, 'You had better give me another barge.' 'Well,' he says, 'No, that will do you all right,' he says; 'All we want to take abaft there.' I says, 'All right, then.'
>
> Q. Pardon me for interrupting, but why did you want another barge? A. I thought I was getting about all I could get on her. If I wanted to continue to work and work the men, why, I would have to get some more room to work in. That is all. I couldn't dump overboard; that was a cinch. That is the reason.
>
> Q. What did you say that Woodside said when you asked him for another barge? A. He said that that barge would hold. I could get on there everything that was wanted to get up.
>
> * * * * *
>
> A. There was a Crowley man on board at about 10:30 in the forenoon and he was asking me how much more we were going to put on there, and I told him I didn't know, *I didn't think it would hold much more.* * * * That is the reason I spoke to Woodside about it at noon as well. * * * Well, I still continued to unload on the barge. *I would load her until she sunk right there, and any man will do as he is told."* (id. 228, 230.) (Italics ours.)

Mr. Messick continued:

In the afternoon I continued to dump buckets on the stern. About three o'clock one of the men called to my attention that she was down by the head pretty strong. So I had the barge moved up a little bit and I told the men to dump the buckets on the diagonal corner away from the corner that was down. (id. 230.) There were four cones, or mounds, of ballast on the barge. One cone began sliding, but I kept on loading more and more, trying to straighten out the list. (id. 233.) Other cones began sliding toward the outside and the barge had considerable list. At about 3:50 or 4 o'clock the mate of the 'Monongahela' said, 'That is enough', and he wanted me to put on three or four buckets of rubbish, which I did. (id. 233, 234.)

"So I think I brought three or four buckets of that, when the two men that was out on the barge called over and said, 'Tom, she is going down by the head there', he says. I says 'The best thing we had better do is to put the men on and trim her'. I went over to the side and took a look at her and said, 'I will get the men up and trim her'." (id. 234.)

"Q. There had not been anybody on her to trim her before? A. No. I had just these two men at the buckets and the rest of the men were in the hold." (id. 234.)

By the time the men got down on the barge she was awash, so I called the men back to the 'Monongahela'. (id. 234.) There had been a Crowley man down on the 'Monongahela' at about 4 p. m. He just as good as told me to stop loading on the barge immediately, and then he went off as if he was looking for someone with more authority. (id. 236.)

The lighter was fastened to the 'Monongahela' by three 6 or 8-inch Manila lines and one steel cable. These lines were tight. After the men got back on the 'Monongahela' I stood and

watched the barge. She listed more and more until the weight became so heavy on the outside that something had to go, and then the whole barge collapsed. Either the lines had to break or the lighter had to break, and the lines held. (id. 236, 237.)

This was the testimony of the boss of the job, the employee of the San Francisco Stevedoring Company, made a third party respondent in the action.

Edward Jones, also a stevedore employed by the San Francisco Stevedoring Company on the "Monongahela", corroborated the testimony of Messick; that Messick bossed the job (Jones, 54), that the ballast was wet (id. 54), that the buckets were full (id. 58), that on Monday some time prior to its destruction the barge was listed, that the heaps of ballast were 16 to 18 feet high by Monday noon (id. 55). He testified:

"A. I know positively that I heard McCue say—

Q. To whom? A. That the barge was really loaded—telling the mate.

* * * * *

A. I could not state for sure whether it was Sunday afternoon or Monday morning. You see, that is a long time ago. A. Anyway, the mate told him that there was not a great deal more to be put on there and it would hold it, and McCue says, 'All right, we will go ahead and put it on'.

Q. When you came back from lunch, what was the condition of the lighter? A. The barge was listed pretty bad." (id. 56, 57.)

Jones further testified:

At 2 o'clock I helped shift the barge ahead so as to put more sand on the outer corner to

try and level up the barge. I then went back into the hold and worked until about 4 o'clock sending up ballast. (id. 57, 58.) Messick called us up then and wanted us to go down on the barge and trim it. (id. 58.) I did not go, as when I reached the deck the barge was tipping up. (id. 59.)

Mr. Jones watched the collapsing of the lighter, and his testimony is of interest:

"Q. Describe what you saw. A. The barge was tipping up at the corner, and the sand had commenced, at the time I got up there the sand had commenced to slide down off these cones over the edge of the barge into the water.

Q. How about the lines? A. And the lines were beginning to tighten * * * because the barge, going down, tightened the outer lines; it would have to tighten them; it could not keep from tightening them; it tightened them and held the barge there.

Q. Continue. A. The barge, when the sand commenced to slide down—this cone was naturally just sliding over, and the barge, I could see it, was turning over, and the bottom of the barge caught against the boat and was completely demolished—over she went, and up went everything that you can think of, as high, almost, as the mast of that boat, dirt and everything else, just like a terrific explosion.

Q. How badly was the barge broken by this explosion? A. It was broken all to pieces; the sides were torn away—it just caved right away from the forward end next to the boat, and swept loose there; big heavy iron bolts about an inch or an inch and a quarter through pulled right out of it.

Q. Why didn't the barge simply dump? A. She could not.

Q. Why not? A. The weight naturally tore it to pieces, because it was caught against the boat.

Q. Why didn't they cut the lines? A. That is what I wanted them to do; I wanted them to cut the lines and let the barge swing over and save the barge; I told them to, but, no, they would not do it; they tried to put another line on it.

Q. To hold it tighter? A. Yes." (id. 59, 60.)

Louis Langren, captain of the Red Stack tug "Reliance", and a disinterested witness, saw the lighter No. 76 shortly before she collapsed. His tug was between Piers 34 and 36, engaged in taking out the steamer "Seiyo Maru"; and he had a clear view of the lighter lying on the south side of Pier 36. His testimony is clear and explicit:

"Q. When did you last see her afloat? A. At about 4:15 or 4:20.

Q. Where was she lying then? A. Alongside of a ship on the south side of Pier 36.

Q. You saw her from where? A. From the deck of my tug.

Q. In what condition was she? A. She was very heavily loaded and apparently buckled: her forward end, the out-board end, the end toward the bay, was apparently square, and the in-shore end and the out-board end away from the ship was considerably lower than the forward end, apparently buckled 12 or 14 inches.

Q. How was she loaded? A. Very top-heavy; heavily loaded.

Q. What condition was she in to tow? A. Very unsafe condition.

Q. Why? A. Overloaded; top-heavy.

Mr. Griffiths. I object to that unless he knows what sand was on her; he simply looked at her.

Q. What experience have you had in lighters, captain? A. About three years—probably

six years all told; 14 years, all told, I have been working on this bay, towing lighters and vessels, and 6 of those years I was working for the San Francisco Quarries and Gray Brothers, towing rock barges and lighters of all descriptions.

Q. Can you tell by looking at a lighter whether she is top-heavy? A. I certainly can.

Q. What would you say the effect of the loading of the kind you saw on the lighter would be on that lighter? A. From the position I saw the lighter in, I would say she would open up her seams and break her back.

Q. Why? A. Because she was buckling, she was unevenly loaded; the out-board corner was more heavily loaded than the amidships section of the barge, having a tendency to twist the barge, and break the barge's back, and open up the bottom seams and side seams, causing the barge to take in water.

Q. After you saw her in that position, when did you see her again? A. After I had pulled this ship out—this entire time I had a hawser on the 'Seiyo Maru's' stern, pulling up against the ebb tide, and I had the south side of Pier 34 or 36 entirely open, and the barge was in plain sight all the time, and there was a sort of explosion, and the sand was apparently rolling down, and apparently she had broken her back and opened up." (Langren, 194, 195, 196.)

The deckhand of the tug "Reliance" also saw the lighter No. 76, and testified that she was in a top-heavy condition (Zecher, 213, 214).

Mr. David Crowley, vice president and general manager of the Crowley Launch and Tugboat Company, testified that on Monday afternoon he was driving along the waterfront in an automobile when

he noticed the condition of the lighter No. 76. He saw that she had a list to starboard, that she was loaded very deep and that the cones of ballast were unevenly loaded (Crowley, 69). He sent Jim McAndrews to telephone to the office about the barge (Crowley, 70).

McAndrews' testimony is short and to the point:

> "Q. When was the last time that you saw this barge 76 afloat? A. Monday, about between 3 and 4 o'clock.
>
> Q. Where were you? A. I was with Mr. Dave Crowley in a machine going along the seawall.
>
> Q. Will you describe her appearance? A. She was alongside of the 'Monongahela', port side to, and they were dumping sand on her, piles, and she had a heavy list to starboard, and I says to Dave Crowley, 'Gee, they are overloading that barge'; he said, 'Go and 'phone in to Wilder', and I went to the 'phone at the Pacific Mail wharf and 'phoned in for Wilder, and came back and got in the machine with Dave Crowley, and drove down to Pier 14. That is all I know about it.
>
> Q. How high were the piles? A. I should judge about 10 to 12 feet, I guess.
>
> Q. What would be the effect of the loading as you saw it, upon the barge? A. I thought that she was overloaded.
>
> Q. What would be the effect of the overloading? A. It would buckle and bust her in half, or capsize." (McAndrew, 107, 108.)

J. J. Wilder testified that he was at the Crowley Company office at Pier 14 when McAndrews telephoned for him (Wilder, 83).

> "A. He told me that the barge looked in rather poor shape, that I had better get over

there and take a look at her, that she had quite a list, so I got over there, which took me about ten minutes to do, so in looking over the side of the ship—

Q. Looking over the side of what ship? A. The 'Monongahela'.

Q. You went aboard the 'Monongahela'? A. Yes.

Q. Then what? A. I took a look at her, and I turned to the hatch tender—

Q. You took a look at her from where? A. From the deck of the vessel first, and I saw her condition, I saw where she was badly listed, and she appeared to me to be badly strained, so I went right down on board, and down into the hold on the starboard side.

Q. The hold of what? A. The barge, and I saw it was a case of get a pump over there, that the barge would not last.

Q. Why? A. On account of the incompetent loading.

Q. How was it incompetent? A. In loading the barge they worked too long amidships, causing a strain on the barge, in other words, a sort of buckle, a settling down, which no doubt opened up some of the butts or seams; the water then was just about even with the deck.

Q. Where? A. On the starboard side.

Q. Forward or aft? A. Right amidships, and the barge was gradually settling; so I heard that water coming in, and I came up out of the hold, and I sung out to the fellows that were on the piles dumping these tubs—they only dumped about one while I had gone down and come up from the hold again—

Q. They were still dumping? A. They were still dumping.

Q. Then what? A. I says to them, I says, 'What the hell are you trying to do, dump this barge, or break her in two, which?'

Q. Who did you say that to? A. I said it both to the men on the barge, and also to the

fellow that appeared to be the boss; he told me his name was McCue.

Q. What did he say? A. He said, 'I can't see anything wrong.' I said, 'Why can't you?' I said, 'Take a look over the side. What is the matter with you? Are you a dummy?' He said, 'I can't see the other side of the barge on account of these peaks, they are too high.' I said, 'Certainly, they are too high.' I said, 'The best thing you can do is to get your men out of the hold and trim it, if it can be done now.' " (Wilder, 83, 84, 85.)

Wilder immediately left for the Crowley office to get a large gasoline pump (id. 86).

To this uniform testimony of both interested and entirely disinterested witnesses, what answer do the respondents make? Two employees, W. W. Scott, port superintendent of Struthers & Dixon, Inc., the operator of the bark "Monongahela," and James E. Woodside, general manager of the San Francisco Stevedoring Company, who were on the "Monongahela" only occasionally during the loading, were introduced to testify that at about 3:30 the lighter "was on an even keel".

J. E. Woodside testified that he looked down upon the barge from the deck of the "Monongahela" about an hour before the barge sank and that at that time she appeared to be on an even keel (Woodside, 169). He did not deny that Messick had told him before lunch that the barge was fully loaded and that another barge should be put in. He did not deny that the barge appeared to be overloaded. He did not state that the freeboard of the barge showed that

the barge had a sufficient margin of safety. He simply stated that an hour before the collapse the lighter, as she looked from the deck of the "Monongahela", appeared to be on an even keel.

This may possibly have been so, and yet the barge may have been extremely tender, overloaded, badly loaded and strained. That she was all of these things is borne out by the testimony of libelant's witnesses, and that the center of gravity was high and that she was tender is not denied by the respondents.

This brings us to the consideration of the question of time. Langren, testifying from his log, stated that he was off Pier 34 from 4:20 to 4:55 P. M. Before he left the lighter had collapsed (Langren, 205). Wilder testified that he was telephoned to by McAndrew that the barge was listing; that it took him about ten minutes to get over to look at her (Wilder, 83); that it was then 4:10 (Wilder, 87); that he arrived back again just as she was going down at 4:40 (Wilder, 89; Sennott, 99). Messick testified that the loading of ballast stopped at about 3:50 (Messick, 233); and that then the loading of the rubbish began (Messick, 234).

Thus, admitting the testimony of Woodside to be correct—that when he saw the lighter about an hour before she collapsed, or at about 3:40, she was on an even keel—this is not necessarily in conflict with the statements of the other witnesses. There is no denial of Messick's statement that at 3 o'clock the lighter had a pronounced outboard list (Messick,

230), and that he had the barge shifted and started to put ballast on the corner diagonally opposite (Messick, 230). There is no denial that when Crowley and McAndrews saw the lighter at about 4 o'clock she had a serious list. There is no denial of the condition of the barge when Wilder arrived at 4:10, or that the cones were then rapidly slipping (Messick, 233, 234). There is no denial that the lighter was badly buckled when Langren saw her at 4:20. The whole situation seems clear: the barge was fully loaded at noon; she took a bad list at about 3:00 o'clock; Messick had previously protested and been ordered to continue; he dumped on the end opposite the list; this brought the listed corner up, but the strain was too much for the barge, and toward 4 o'clock the cones of ballast began to shift and the lighter commenced to buckle; the more the ballast slid, the more the lighter listed, and this caused additional amounts to slide; the buckling opened the seams, and by 4:30 the barge was lost—unless the lines were cut and she was permitted to dump.

W. W. Scott testified that at about 3:30, shortly before Woodside saw the barge, she lay on an even keel. What has been said as to Woodside's testimony applies equally to Scott. Like Woodside, he denied nothing; so that here we have only the testimony of an interested witness that at 3:30 the lighter appeared from the ship to be on an even keel.

The astonishing thing about the case of the respondents is, that they failed to call the very wit-

nesses who at all times were on the job and who saw what did happen. The mate of the "Monongahela" was continuously on the "Monongahela", directing the discharge. He was not called. The stevedore employees working on the barge itself were not called. The only witnesses called were those who did not and could not see what happened.

The above—except for certain theoretical testimony of an expert, Captain Mills, who was called to prove that, based on various presumptions as to what was done in Manila, the barge could not possibly have been overloaded—constituted the respondents' case. This "Captain Mills' theory" was so emphasized by the respondents in the Court below that it will be separately dealt with here.

IV.

THE CAPTAIN MILLS THEORY.

When the destruction of the No. 76 occurred the Crowley Launch and Tugboat Company made an immediate investigation of the cause of the loss. To check the uniform statements of witnesses that the barge was heavily overloaded, the Crowley Company made an independent calculation. It secured from the hold of the "Monongahela" a sample of the ballast and had it weighed by one of the leading firms of analytical chemists in San Francisco,

Messrs. Curtis & Tompkins (McElligott, 95; Jones, 96). The weight was ascertained to be 81.5 lbs. per cubic foot. The buckets used in discharging were measured and found to contain one cubic yard (Dickie, 116). Messick stated that the buckets ran full, and from his tally book it was ascertained that 546 buckets of ballast had been dumped on the barge.

This figured:

Buckets	**546**
Weight per bucket (27 cu. ft. at 81.5 lbs. per foot)	**2,200.5 lbs.**
The weight of ballast loaded on the barge was therefore 600.7 short tons*	**(1,201,473 lbs.)**

This checked with the statement of the witnesses and showed a very large overloading of the barge—and a wide margin in case some buckets were not completely filled.

In opposition to the uniform testimony of witnesses and the above exact calculation of libelant, the respondents offer the theory of one Captain W. F. Mills, a surveyor in San Francisco, employed by themselves. Some time after the accident Captain Mills went to the "Monongahela" and computed the amount of ballast left in the ship.

Mr. Mills testified that by looking from the dock he saw the draft of the ship to be 8 feet 8 inches forward and 11 feet 8 inches aft,—a mean draft of 10

*Short Tons: In chartering barges in San Francisco, when a barge is ordered of so many tons, short tons is meant (Crowley, 188).

feet 2 inches (Mills, 179).* From this mean draft he proceeded to compute the amount of ballast left on board the "Monongahela", by means of the ship's displacement scale—a scale apparently made up when the ship was built, some twenty-seven years before. He admitted that if there had been changes made on the ship during her years in English and German hands, such changes would have made the displacement scale incorrect (Mills, 183). The only change that he actually knew of was the addition of a donkey-house forward; but he did not make allowance for this in his computation (Mills, 180). He presumed the ship had been scaled several times, and he said that this would make the displacement incorrect (Mills, 182).

With this displacement scale in hand he calculated as follows:

Dead weight at mean draft of 10 ft. 2 in.....475 long tons

He then estimated the stores and dunnage at..... 50 long tons

From which he calculated the ballast left on the "Monongahela" to be.....425 long tons (Mills, 175.)

*Just when Captain Mills took the draft of the "Monongahela" is not clear. He testified first that it was "on the afternoon of December 15th, toward the close of the discharge" (Mills, 174). He later testified that "it was four or five days prior to "December 22nd"; and again that it was "somewhere about the 15th or 16th. I have no notes of that" (Mills, 178). It seems certain that this witness must have known whether he took the draft before or after the accident. His answers make it almost certain that he took the draft after the accident, and at a time when he must have known that his employers would probably be sued for the loss of the lighter.

An examination of the displacement scale introduced showed that Mills used the fresh water and not the salt water column of the scale, although the draft was alleged to have been taken on San Francisco Bay. His testimony in this regard in open Court ran, in part:

> "Q. That gives you 10 feet 2 inches; taking that on the ship's scale that we had here, you get what? A. 475 tons of cargo—of whatever is on board the ship." (Mills, 176.)

When, on deposition, it was pointed out to him that he had given an incorrect statement to the Court, he testified:

> "Q. Why did you enter it at 475 in your estimate, when you were making up that table that went before the Court? A. To make a conservative figure, not to over-estimate the amount." (Mills, 287.)

In other words, Captain Mills admits that he testified incorrectly to the Court, but states that he gave his testimony, which was 50 tons out of the way, in order to be conservative.

Working with the above figures of 425 long tons, the computed amount of ballast left aboard ship, he then took a statement rendered from Manila billing the ship for 800 metric tons of ballast. Presuming that this was the exact amount of ballast delivered to the ship at Manila, he figured that there was placed on the barge the difference, or 406 short tons (362.5 long tons).*

* The barge was chartered to carry 400 tons (W. W. Scott, 134). Captain Mills stated that he did not include in his calculations a new donkey-house, engine and boiler which he stated might have weighed seven or eight tons (Mills, 181).

After the trial the proctors for the appellants happened to be examining some photographs which showed the stern of the "Monongahela". These photographs had been taken the morning after the destruction of the lighter. To their surprise, they noticed that the draft mark aft on the "Monongahela" was not 11 feet 8 inches, as testified to by Captain Mills, but was approximately 10 feet 8 inches (Swadley, 259, Exhibits A and B). In other words, Captain Mills' testimony was one foot incorrect on the stern draft.

Assuming that the respondents' witness was not in error as to the draft forward as well as aft,—and his incorrect testimony does not make this assumption reassuring,—there still was an error of six inches in Captain Mills' calculation of the mean draft. By application of the displacement scale, this error of six inches of mean draft results in showing that there were 168 short tons (150 long tons) more on the barge than Captain Mills testified. If the weight of 406 short tons (362.5 long tons) on the barge as calculated by Captain Mills was a correct calculation, based on an 11 foot 8 inch draft aft, this addition of 168 short tons (150 long tons) brings up the discharge, by Captain Mills' own figures, to 574 short tons.

The close calculation of the amount of deadweight capacity in a ship by a man standing on a deck and looking down at her draft marks at the bow and stern, exposed to the lap of the waves, is obviously

impossible.* At best it can be only a rough approximation—where the difference of a few inches means a difference of more than one hundred tons of cargo. The photographs (Exhibits A and B) show how difficult such an attempt is.

Here Captain Mills testified incorrectly as to what the displacement scale showed in order to be "conservative". The photographs showed that in addition he gave the stern draft incorrectly. He used as the basis for his calculation a displacement scale evidently made up when the ship was built, about 1892. He admitted that any structural change on the ship would make the displacement scale incorrect. He did not know whether any changes had been made. He further took as the basis of his computation an alleged amount of ballast received at Manila. No one testified as to whether or not, when the bark reached Manila, she may not have had a certain amount of ballast already in her. No one testified as to whether further ballast was not loaded after the 800 tons alleged to have been loaded. The ballast was very wet when loaded on the lighter. The ship arrived in the rainy season, and it seems entirely likely that the ballast was dry when loaded on the ship and wet when discharged.

*Thomas Walton, in his standard work, "Know Your Own Ship", says:

> "The 'tons per inch' curve is thus a means of roughly checking the weight added to, or removed from the ship. The method would be more exact if it were possible to measure the ship's draught at the stem and stern post accurately. The surface of the water, however, is seldom smooth enough to permit of precise measurements being taken." (page 9, 14th Ed.)

This would account for a large increase in weight over what the same quantity weighed in Manila.*

Failing to take into account the above considerations, the respondents further, by their various presumptions, unsupported by any evidence, and by a mass of theory instead of the testimony of their own employees on the ship, whom they did not wish to call, have sought to prove that the barge could not have been overloaded.

V.

ABILITY TO AVOID THE LOSS OF THE LIGHTER.

The testimony of Mr. Messick, substantiated by that of Mr. Dickie, was that a dual cause of the destruction of the lighter was the failure to cut the heavy lines which bound her tightly against the "Monongahela", with the result that the pressure on the outboard side of the barge caused the inboard side to be jammed against the iron ship until the pressure became so great that the lighter collapsed. No one has disputed the fact that if the lines had been loosened or cut, the lighter would have swung clear, dumped her load, and remained intact.

Eliminating all other evidence, the charterers are liable for their failure to cut the lines and let the barge dump.

*There was no testimony as to the water in the "Monongahela's" bilges at the time the "Monongahela" was discharged. Water in the bilges is normally to be expected after a long voyage; yet such water was not considered by Captain Mills in urging his theory of the displacement scale weighing.

The Willie, 231 Fed. 865 (C. C. A. 2d, 1916), is in point. The facts in this case were as follows:

> "The Borough Development Company is a corporation engaged in the business of transporting ashes and other refuse for the City of New York, and has a dump at the foot of Fulton Street, Brooklyn, where it loads scows for that purpose. May 15, 1913, the scow Thomas Connell was lying loaded under the dumpboard with the light scow Ward outside of her. * * * As this was being done the load on the Connell shifted against the starboard rail, broke it, and opened up a seam on the deck through which she took on water. This gave her an outboard list, which gradually increased, with the effect that the Connell's bilge was brought with an ever increasing pressure against the bottom of the light scow Ward A and a constantly increasing strain was put upon the lines. An effort was made to correct the list by trimming the cargo of the Connell, but without success, and she tore off several planks from the bottom of the Ward A, causing her to sink and shortly after sinking herself. It is said by some of the witnesses that all this could have been prevented if the captain of the Ward A had let the Connell's lines go. *The circumstances, however, show that it would have been impossible to do this because of the strain on them, and that the only remedy would have been to cut the lines. The District Judge found that when the captain was about to do this he was stopped by Curran, who told him that he would be arrested if he did so.* (Italics ours.)
>
> "The libelant insurance company, having paid the damages sustained by the Ward A, filed a libel against the Borough Development Company, the tug Willie, and the scow Connell, charging each with fault. *The District Judge, finding no fault with the tug, dismissed the libel as to her, and also as to the Connell, on*

> *the ground that her fault, if any, was not the proximate cause of the injury, but that the Borough Development Company was solely at fault, because its foreman, who was in charge of both scows, by his order to the captain of the scow Ward A, prevented the last chance of saving her.* We agree with the court as to the fault of the tug and the fault of the Borough Development Company, but we think that the scow Connell should not have been exonerated." (Italics ours.)

The Court points out that the reason for holding the scow Connell liable *in rem* is that it was the scow Connell which actually damaged the Ward A, although her doing so was caused by the Borough Development Company.

This case is similar to the present case. The pressure on the outboard side of the "Crowley 76", causing pressure against the iron ship "Monongahela", broke that lighter, whereas the pressure on the outboard side of the scow Connell causing pressure against the wooden barge Ward A, broke the Ward A. In either case cutting the lines would have saved the barges. In the Willie case, the failure to cut the lines was held the proximate cause of the disaster. In the same manner Messick or the mate of the "Monongahela" could have saved the "No. 76" by cutting the lines. This they failed to do, and the pressure increased until the lighter "No. 76" collapsed.

VI.

THE FAILURE TO TRIM THE CARGO WAS AN ACT OF NEGLIGENCE.

It was stated by Messick, and was not denied by the respondents, that the barge was not trimmed prior to about 4:10, when the men were called up from the hold of the "Monongahela" to trim the lighter. It was then too late. One of the vital questions in this case, therefore, is: Are charterers of lighters or other vessels allowed by law to dump freely on such vessels without distributing the weights by trimmings; or should they trim bulk cargo, thus equally distributing the weight? In this connection two cases are of interest:

The Adah, 258 Fed. 377 (C. C. A. 2d, April 16, 1919) involved the following facts:

C. A. Fox owned the deck scow Adah. She was chartered to carry "ore or 'copper concentrate' (a sticky, clayey substance that will not run and distribute itself like sand or crushed stone)".*

The lighter was figured to carry 765 tons, but was loaded with not over 743 tons. While starting to tow her from her loading berth she careened, dumped her load and struck and injured the S. S. Uller, from which she had been taking the concentrate. The owner of the S. S. Uller sued Brady, the stevedore on the job. Brady brought into the suit Fox, and Beer, the owner of the cargo. Brady and

*E. S. McElligot, a chemist of Curtis & Tompkins, San Francisco, who examined a sample of the ballast, testified as to its nature: "It would pack; it was not free running sand at all." (McElligot, 96.)

Beer claimed the Adah unseaworthy. The Court held Brady liable for failure to trim the scow.

The Court said, in part:

> "When a tight boat capsizes in calm water, the inference is almost irresistible that her action is due to the disposition of her load. But we do not rest on the inference; it is positively proven, and by Mr. Brady himself, that no trimming was done, the material was dumped approximately amidships, and left to 'run when it got piled high enough', but only the 'dry part would run'. And by other witnesses it is shown that before a full load was put on the Adah the deck was awash on the port side, and she was heavy by the stern. We find that this was the reason why the 25 tons additional that she ought to have carried were never put aboard, and why she was removed from the Uller's side. We also accept the testimony that this combination of longitudinal and transverse unevenness is peculiarly dangerous, and find that the Adah was in such a condition of instability that the oscillations caused by hauling her across the tide (slight as they must have been) were enough to tip her over."

The Robert R., 255 Fed. 37 (C. C. A. 2d, 1918), involved the following facts:

The lighter Robert R. was chartered to transport copper ore from the S. S. Prinz Frederick Hendrik. Stevedores were employed by the charterers. "The lighter was loaded by the stevedores so that there was but little more weight of ore on one side than the other; but the ore was not spread, and the center of gravity apparently became so high, because of the deep pile of ore along the center of the deck, that *finally a single bucket of ore, weighing about*

*half a ton, tilted the lighter, the stern corner hit the steamship, and caused the load to shift and the lighter to dump a part of the ore."** (Italics ours.)

The Circuit Court of Appeals, in holding the stevedoring company liable for the loss, said:

> "Indeed, the fact that the stevedores did not contract to trim seems to us in no way to relieve the latter from liability. They undertook to discharge the cargo, and were bound to do this in a prudent manner. If it became unsafe to load the barge without trimming, as proved to be the fact, it was the plain duty of the stevedores to stop work and call upon the steamship to trim. Instead of doing this, they continued to pile the ore on the deck of the lighter, without seeing that it was spread by some one, until the center of gravity of the lighter became so high that she dumped her load. * * * If the stevedores had ceased loading and called for trimming and secured assistance, the accident would not have happened. Their continuance in loading when danger was imminent was the proximate cause of the damage, and they only are liable in tort. It was the dumping of the last buckets of ore on the lighter that caused the injury."

*The testimony of Messick is to be compared:

"A. Yes, cone '1'; cone '1' starts to slide and I did not notice that at first. Then I see him coming down stronger and I keep loading more and more over on these two points here trying to bring it out.

Q. Those two points— A. 'A' and 'B', trying to bring this up here; I think I am a little bit off keel and I am trying to bring her to an even keel; but she has gone down here so far that the top of these cones begin to slide there to the outside rail here, and the boat is taking quite a list. I think it was at 3:50 or about 3:50 or 4 o'clock he says, 'That is enough'.

Q. Who says that? A. The mate." (Messick, 233.)

VII.

CONCLUSION.

It can be seen that the present case is one of extreme importance for those who, under demise charters, charter lighters, tugs or other vessels on this coast. The law has been regarded as settled, that one who chartered a vessel in good condition and returned it in bad condition was obligated to show the cause of the loss and that the negligence of the charterers did not contribute to it. Any other position, if taken by the Courts, would be a direct invitation to carelessness by charterers. If the burden of proving cause of loss and negligence is on the owners in such cases, the owners will generally have small chance of proving their cases. The obvious reason is that in nearly all instances where a lighter or vessel is destroyed while in the possession of the charterers the only witnesses who know what actually happened are the employees of the defendants; and if there is negligence in the handling of a lighter it is the negligence of these very employees of the charterers. For an owner, before he can recover, to be compelled to secure evidence against their employer from the employer's witnesses (who, if they admit that they were negligent, are apt to be discharged), is to place a practically impossible task on the vessel owner. Occasionally, in a case of palpable negligence, evidence of such negligence can be obtained from the charterers' employees who have left his employ. Such cases are, naturally, very rare. We do not believe that the Circuit Court of

Appeals desires to make such a change in the law and to place upon vessel owners such a task when their vessels are lost while in the possession of demise charterers.

Granting, however, that the Circuit Court of Appeals should hold that hereafter in this circut where a vessel is destroyed while in the possession of a demise charterer, the owner, in order to recover, must show: (1) how the accident happened; and (2) that the charterer caused the loss by its negligence; the case still is of great importance in the making of future charters. This is because of the evidence which was introduced.

The uncontroverted evidence showed:

1. That the lighter, chartered to the respondents to carry 400 short tons of ballast, was delivered into the possession of the respondents.

2. That the lighter at the time of delivery was inspected and found to be in first-class, seaworthy condition; that it had been kept by the owners in a state of repair; that within thirteen months of the time of the accident it had been used for the carriage of 500-ton loads of nitrate, worth up to $50,000 in value per load. Not one word of testimony to the effect that the barge was unseaworthy was introduced by the respondents.

3. That after the delivery of the lighter, it was loaded by stevedores in charge of a gang boss named Messick.

4. That on the morning of the accident Messick told James Woodside, superintendent of the San Francisco Stevedoring Company, that the barge was fully loaded and that a new barge should be procured; that Jones, another employee of the San Francisco Stevedoring Company, heard Messick tell the same thing to the mate of the "Monongahela"; that Woodside told Messick to continue to load the barge; that when given such orders Messick testified that he would *load her until she sank.*

5. That loading was continued until about three o'clock Monday (the day she sank), when Messick noticed that she was listed at one of the outboard corners; that he had the lighter hauled ahead, and dumped on the diagonally opposite corner.

6. That the ballast was dumped on the barge until 3:50 P. M., Monday, and then rubbish of unknown weight began to be dumped.

7. That at about 4:10 Wilder, an employee of the Crowley Company, came on board the lighter, and in no uncertain terms told Messick to stop loading the lighter; that the lighter was then buckling.

8. That up to that time *no attempt had been made to trim* the ballast dumped on the barge.

9. That only then did Messick stop discharging and ordered his men up from the hold to trim the barge; that the ballast was slipping from the cones toward the outboard side of the barge; that two men went down on the barge, but it was then too late to trim her, and the men hurried back to the ship.

10. That when Captain Langren saw her from his tug at about 4:20, the barge was heavily overloaded and was buckling on the outboard corner.

11. That the barge was then tightly fastened to the "Monongahela", so that a tremendous strain was produced on the barge by the downward pressure of the ballast on the outboard side and by the corresponding upward pressure of the barge against the ship's side; that as the ballast slipped outboard the strain increased until the barge collapsed and broke all to pieces.*

12. That although Messick was urged to cut the lines holding the lighter fast against the ship, which would have allowed her to swing out from the ship's side and dump her load, he did not do so, but simply allowed the strain to increase until the barge was broken; that he and the stevedores under him simply watched her from the rail from about 4:15 to about 4:40.

The only testimony introduced to controvert the admission of the man in charge of the work that he overloaded the barge and the above undisputed facts, was that given by two interested witnesses who testified that at about 3:30 or 3:40 P. M. the lighter appeared to be on an even keel. These same witnesses said nothing as to the lighter's freeboard, and did

*David W. Dickie, a well-known naval architect and engineer, testified in detail as to how a barge of the type of the "No. 76", loaded as she was and fastened as she was, to the "Monongahela", would, on the slipping of her load to the outboard side, encounter great strain, resulting in her collapse (Dickie, 115, 119).

not deny that the lighter was overloaded and buckled. They confined themselves to saying that at about the times stated she appeared to be on an even keel.

The respondents' leading witness to prove that there were only 406 tons loaded on the barge based his testimony upon a displacement scale about the accuracy of which he admitted he knew nothing, and apparently drawn some twenty-seven years previous. His computations were based upon the assumption that certain ballast was loaded at Manila, upon the assumption that this ballast was accurately weighed at Manila, upon the assumption that there was no ballast in the ship when this ballast was loaded and upon the assumption that no additional ballast was taken. His computations are further based upon the accurate taking of the draft marks of the vessel at the time of the accident and upon an accurate application of these marks to the displacement scale. He clearly made an error of about twelve inches in taking the draft aft; apparently took the draft, not at the time of the accident, but several days later; and has admitted that he read the scale incorrectly.

The respondents carefully avoided calling either the mate of the "Monongahela", who was on the ship during the loading and who saw the lighter loaded from beginning to end, or any of the ship's crew or the stevedores actually working on the barge. The failure to call these witnesses, and particularly the mate, raises a strong presumption that their

evidence would have been unfavorable to the contentions of the respondents.

The Steamer Southern Belle, 18 How. 584; 15 Law Ed. 493, 495;

Consolidated Coal Co. v. Knickerbocker Steam Towage Co., 200 Fed. 840.

If the libelant producing such uncontroverted testimony cannot recover in this case, it is hard to believe that an owner can ever recover against a demise charterer for loss of a vessel in the latter's possession. That both owners and demise charterers will, in the future, on the Pacific Coast, be largely guided by the decision of the Court in this case, is, we think, almost certain.

Dated, San Francisco,
May 1, 1922.

Respectfully submitted,
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